Mid-East Consolidation Warehouse, A Division of Ethan Allen, Inc. ***and*** **Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 3-CA-7004

December 16, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 10, 1982, Administrative Law Judge James L. Rose issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed limited exceptions and a supporting brief, and Respondent filed an opposition to the General Counsel's limited exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the limited exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as so modified.

The Administrative Law Judge failed to make any findings with respect to the portion of the backpay specification dealing with Respondent's retirement plan and profit-sharing plan. The General Counsel excepts to the failure of the Administrative Law Judge to order Respondent to make payments to these two plans on behalf of the six discriminatees in this case. We find merit in the General Counsel's exception.

The backpay specification alleges the existence of Respondent's retirement plan and profit-sharing plan, and further alleges that "[t]he obligation of Respondent to make whole discriminatees under the Board order will therefore be discharged by making proper retirement and profit sharing credits which would have been made on their behalf during their respective backpay periods, in addition to the amounts set opposite their names in the last (unnumbered) paragraph [in the backpay specification.]" In its answer, Respondent admitted the existence of the two plans, but denied the above-quoted allegation of its liability under the plans "as it is written." The matter was not specifically litigated at the hearing and, as previously noted, the Administrative Law Judge failed to make any findings as to this issue.

In its opposition to the General Counsel's limited exceptions, Respondent argues that the General Counsel failed to meet his burden of proof as to the discriminatees' entitlement for benefits under the retirement plan and profit-sharing plan, since the General Counsel did not allege or prove the dollar amounts due on behalf of each discriminatee under the plans, or establish the eligibility of the discriminatees under the plans. We find no merit to these contentions. Section 102.54(c) of the Board's Rules and Regulations provides, *inter alia*, that in an answer to a backpay specification, the failure to deny any allegation in the manner required by Section 102.54(b) shall result, if such failure is not adequately explained, in the allegation being deemed to be admitted as true. Here, Respondent's denial of the above-quoted allegation in the backpay specification "as it is written," with no further explanation, clearly does not meet the requirements of Section 102.54(b).

That section provides in relevant part:

> The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

At no time during these proceedings has Respondent argued that it did not have adequate information about the retirement and profit-sharing plans to ascertain the amounts due, or make a motion requesting that the backpay specification be made more specific. Nor has Respondent at any time denied that the six discriminatees are eligible for coverage under the plans.[1] Thus, we reject Re-

[1] Our dissenting colleague erroneously fails to distinguish between an employee's eligibility for participation in retirement or profit-sharing plans by having contributions made on his or her behalf and an employee's eligibility for collecting benefits under such plans. We are concerned here only with the former. In this regard, Respondent at no point has contended that contributions would not have been made to the plans in

Continued

spondent's argument that the General Counsel has not met his burden of proof, and find merit in the General Counsel's exception. Accordingly, we shall order Respondent to make the appropriate payments to each plan. While it does not appear that there is any dispute as to the sums owed by Respondent to the plans on behalf of the discriminatees, any controversy which may arise as to the amounts due can be resolved in future compliance proceedings.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Mid-East Consolidation Warehouse, A Division of Ethan Allen, Inc., Mayville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Insert the following as the last paragraph of the Administrative Law Judge's recommended Order:

"IT IS FURTHER ORDERED that Respondent make the credits to its retirement and profit-sharing plans on behalf of the six discriminatees herein which would have been made on their behalf during their respective backpay periods."

MEMBER FANNING, concurring in part and dissenting in part:

I agree with my colleagues insofar as they adopt the Administrative Law Judge's affirmative findings regarding specific amounts of backpay due the discriminatees herein.[2]

However, I find no warrant for my colleagues' disposition of the General Counsel's exceptions to the Administrative Law Judge not ordering Respondent to make retirement and profit-sharing plan payments on behalf of each of the discriminatees. Respondent in its answer to the backpay specification admitted the existence of the plans, but denied as written the General Counsel's allegation that it was obligated to make payments on behalf of each of the discriminatees, and denied the amounts of backpay alleged to be due in the backpay specification.

As a consequence of Respondent's denials and subsequent litigation, the amounts found owed to the named discriminatees were decreased by over $59,000—a reduction by some 44 percent of the amount alleged by the General Counsel in the backpay specification.[3] However, although he was also at least on notice of a dispute regarding the retirement and profit-sharing plans in addition to specific backpay amounts by virtue of Respondent's denials, the General Counsel did not seek to litigate, or apparently even raise that issue at the hearing. Nor did he so much as mention the matter in his brief to the Administrative Law Judge. Now, counsel for the General Counsel contends it "appears to be an oversight" by the Administrative Law Judge that he did not order Respondent to make payments to the plans on behalf of each of the discriminatees. Given the above circumstances, however, I find it just as plausible that the Administrative Law Judge inferred the General Counsel had dropped the issue in the face of Respondent's denial, as it is to conclude it was an "oversight" on his part. Hence, I find no warrant for granting counsel for the General Counsel's present request, which in effect grants him summary judgment on the issue.

Indeed, that the General Counsel is not entitled to "summary judgment" request is in my view borne out by the General Counsel's own submission. Thus, while urging the Board to direct payment to the plans on behalf of the six discriminatees, the General Counsel states upon "information and belief" that the plans "begin to vest" after 5 years of completed service, and that the retirement and profit-sharing plans were established effective October 3, 1976, and September 28, 1978, respectively. But employees Chelton, Hammond, and Tarr each had *less* than 5 years' total service from date of hire until declining reinstatement, and employees Miller and Rogers had less than 5 years' service following institution of the retirement plan. Hence, the General Counsel's assertions, at a minimum, demonstrably raise factual questions concerning the eligibility of five out of the six; which presumbably occasioned Respondent's denial in its answer to the backpay specification. Given these particulars, my colleagues' statement that "it does not appear that there is any dispute as to" sums owed by Respondent is, in my view, disingenuous. In light of these facts it is clear that there was and *is* a dispute—and that some of the six may be ineli-

question on behalf of all six discriminatees had they worked during the backpay period. It is these contributions which we are ordering Respondent to make. As to the matter of whether any of the six has or will work long enough to have a vested right to benefits under either of these plans, that is not relevant to our determination here. Whether certain employees are or will be eligible for benefits does not affect their entitlement to the credits which would have been made on their behalf had they worked for Respondent during the backpay period.

[2] Respondent in its opposition to the General Counsel's exceptions asserts that it has already paid, with interest, the amounts found due by the Administrative Law Judge.

[3] At least a portion of the reductions was attributable to information found to be in the General Counsel's files, but which the backpay specification had not been amended to reflect accurately. The General Counsel in his limited exceptions states he now has "no quarrel" with those affirmative findings, "and urges that they be adopted."

gible.[4] Either conclusion appears inconsistent with the General Counsel's request, and in my view makes it inappropriate to grant him summary judgment on the issue.

For the above reasons, I dissent from my colleagues' disposition of the General Counsel's exception. Nevertheless, in light of the Board's interest, and responsibility for vindicating the public rights at stake here and in consideration of the equities involving the affected discriminatees, I would remand this proceeding to the Administrative Law Judge to reopen the hearing for the limited purpose of determining the eligibility, and Respondent's obligation, if any, to make payments on behalf of employees Miller, Rogers, and Olson.

[4] In my estimation, the information set forth by the General Counsel is sufficient to demonstrate that Chelton, Hammond, and Tarr are not eligible at all, and that factual questions exist as to the eligibility of Miller and Rogers.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This is a backpay proceeding occasioned by the Respondent's unlawful discharge (among other things) of six employees beginning on March 30, 1977. The Board ordered they be reinstated with backpay and that the Respondent recognize and bargain with Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), effective February 21, 1977. *Mid-East Consolidation Warehouse, A Division of Ethan Allen, Inc.*, 247 NLRB 552 (1980).

On December 16, 1981, in Mayville, New York, this matter was heard upon the General Counsel's backpay specification and the Respondent's answer.

The Respondent's principal basis of disagreement with the amount of backpay alleged is for economic reasons it reorganized its distribution system and the number of jobs available in Mayville was substantially reduced. Since, the Respondent contends the work remaining would have been assigned based on seniority the amount of backpay due David L. Olson and Floyd W. Tarr is less than that alleged, because they would not have worked full time; and Clifford Hammond and Eugene R. Chelton are entitled to no backpay, because they would not have been called to work at any time during the backpay period. The Respondent does not contest the amount of backpay alleged owing Cecil Miller and Larry W. Rogers.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BACKPAY SPECIFICATION

In accordance with standard formula, the General Counsel calculated the backpay period for each of the six individuals by taking the average wage of employees working out of the Respondent's Mayville facility each calendar quarter following the discharges until either that employee was reinstated or was offered reinstatement which was not accepted. Interim earnings (less any provable costs associated with attempting to seek employment) in each quarter was subtracted from the gross backpay.

The test in determining the amount of gross backpay is how much the discriminatee might reasonably have expected to earn but for the employer's unfair labor practices. And it is well settled that the General Counsel's burden of proof is simply to show the gross amount of backpay due. Then it is incumbent upon the respondent to establish the existence of such facts as would negate the existence of liability to a given employee or would mitigate that liability. Further, the Board has wide discretion in devising procedures and formulas to resolve such backpay issues, limited only by the caveat that the Board's method not be arbitrary or unreasonable. See *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963); *N.L.R.B.* v. *Rice Lake Creamery Co.*, 365 F.2d 888 (D.C. Cir. 1966), where the court noted the "impossibility of exactitude" in arriving at backpay amounts.

The use of a representative group of employees to determine the amount of straight and overtime hours is a generally accepted approach in calculating the amount of lost work probably suffered by a discriminatee. It is reasonable to assume that one would have worked the average number of hours actually worked by a representative group which in this case is the entire employee complement. E.g., *International Association of Bridge, Structural and Reinforced Iron Workers Union, Local 378, AFL-CIO (Judson Steel Corporation)*, 213 NLRB 457 (1974).

The Respondent does not really argue that the formula presented by the General Counsel is erroneous. Nor does the Respondent disagree with the arithmetic of the backpay specification or the amendments thereto based upon information which was adduced at the hearing.

II. THE RESPONDENT'S CONTENTIONS

As indicated above, the Respondent's principal contention is that due to a change of management policy, along with a change of individuals in management positions, the operation of the Mid-East Consolidation Warehouse was substantially altered beginning in early 1977, as a result of which the number of drivers working out of the Mayville facility was reduced. The Respondent argues that this fact should be considered in determining the amount of backpay owed to four of the six discriminatees. The Respondent submits that, absent any discrimination against the six individuals involved in this matter, the work available would have been assigned based on seniority; hence, each discriminatee must be screened against the drivers who in fact worked during the backpay period to determine whether or not that individual

had sufficient seniority to have worked. And this should be done for each calendar quarter of the backpay period.

I reject the Respondent's argument that losses suffered by any of the discriminatees in this matter must be reduced based upon that individual's relative seniority with other employees of the Respondent's who were not discriminated against.

The Respondent claims that absent its unfair labor practices, given a legitimate economic reason for reducing the number of employees at the Mayville facility, it would have terminated employees based upon seniority. This assumption is not supported by the record.

First, in the underlying unfair labor practice case the Respondent sought to defend its discharge of five of the six individuals in question on grounds that the economic changes it now advances were at the root of the terminations. Without deciding this issue, the Board concluded that in any event the Respondent selected the particular individuals for discriminatory reasons. Though finding that seniority played a role in the assignment of routes and trucks, the Board noted:

> Respondent admits that the discharges were not done in accordance of seniority, but argues that it does not have the seniority system. [247 NLRB at 558.]

Thus the very basis upon which the Respondent now contends that its backpay liability should be reduced it said did not exist in the underlying unfair labor practice case. If the Respondent truthfully asserted that it had no seniority system, then there is no reason to assume that absent its unfair labor practices it would have laid off employees based on seniority.

Beyond that there is no particular reason to assume that absent the unfair labor practices found by the Board, the Respondent would have reduced the work availability of anyone.

In effect the Respondent speculates that absent its unfair labor practices it would have embarked on a specific course of conduct. However, it is just as easy to conclude that it would have done something else. For instance, maybe absent the unfair labor practices the Respondent would not have changed its method of operation at the Mayville facility; or, perhaps if it had changed its operation such that a layoff was required, it would have laid off without using seniority and these particular individuals would have continued to work; or possibly, in the event a layoff was necessary at Mayville, the discriminatees would have been offered work at another warehouse (Stanton or Kentland) the opening of which, according to the Respondent, "played a part in eliminating some of the work previously done by Mid-East."

Further, the Union represented a majority of the Respondent's employees prior to the layoffs, and demanded recognition on February 21, 1977. Had the Respondent recognized and bargained with the Union (which the Board subsequently ordered it to do) perhaps they would have agreed to some method by which the employees here would not have been terminated.

In short, the Respondent's assertion that its only course of action would have been to reduce the work available for certain employees based on seniority is not so persuasive as to require such a finding.

It should be kept in mind that the six individuals here lost their jobs because the Respondent violated the Federal labor laws. It is the Respondent's wrongdoing that is the core of this matter and it is that wrongdoing which is sought to be remedied by the backpay specification. Thus, as the Board has held, reasonable presumptions must be found in favor of the discriminatees:

> [T]he backpay claimant should receive the benefit of any doubt rather than the Respondent: the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. [*Southern Household Products Company, Inc.*, 203 NLRB 881 (1973).]

Accordingly, I reject the Respondent's defense and I conclude that the individuals in question are entitled to backpay, with interest calculated as of the date the Respondent makes restitution, as set forth in the backpay specification as amended at the hearing.

Additionally, the Respondent contends that backpay for Tarr should be calculated based only on local (as opposed to over-the-road) work available. The Respondent argues that Tarr had limited himself to local work, citing the testimony of driver Edward Kahle, who once had been the dispatcher. I reject the Respondent's contention.

Even if Tarr had expressed a preference for local runs at one time, such does not mean he would not have taken over-the-road work if only such was available.

The Respondent contends that travel expenses submitted by Hammond in two quarters should not be subtracted from interim earnings in those quarters. The amount claimed ($199 each) does not appear unreasonable. And Hammond did credibly testify that he traveled to seek work. I conclude these items should not be disallowed.

Finally, the Respondent contends that Olson "voluntarily quit his interim employer, Mr. Williams, at the end of 1980." Therefore his backpay should be reduced. However, the record shows that Olson left Williams to return to work for the Respondent and this was on or about January 27, 1981. Olson in fact reported interim earnings for the period January 1 to January 27.

There is nothing in the record to indicate that the allegation concerning Olson's backpay for the first quarter 1981 is not correct. I therefore reject the Respondent's contention.

SUPPLEMENTAL ORDER[1]

Upon the foregoing findings of fact and conclusions of law, and the entire record of this matter, it is ordered

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

that the Respondent, Mid-East Consolidation Warehouse, A Division of Ethan Allen, Inc., Mayville, New York, its officers, agents, successors, and assigns, shall pay to each individual listed below the amounts set opposite his respective name less appropriate withholding required by Federal and state law, with interest to be added at the time of payment at the rate provided for in accordance with the formula in *Florida Steel Corporation*, 231 NLRB 651 (1977). The sums due Floyd W. Tarr are to be held in escrow by the Regional Director for Region 3 pending an examination of him by the Respondent and the General Counsel concerning mitigation of backpay, the Regional Director to make his report to the Board.

Eugene R. Chelton	$33,758.11
Clifford L. Hammond	17,424.44
David L. Olson	37,809.84
Larry W. Rogers	7,131.63
Cecil Miller	2,836.84
Floyd W. Tarr	[2]6,313.61

[2] The accuracy of these amounts is not contested by the Respondent and reflect the amendments to the backpay specification.